

DOCKET FILE COPY ORIGINAL
LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.
SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

ORIGINAL

NORMAN P. LEVENTHAL
MEREDITH S. SENTER, JR.
STEVEN ALMAN LERMAN
RAUL R. RODRIGUEZ
DENNIS P. CORBETT
BRIAN M. MADDEN
BARBARA K. GARDNER
STEPHEN D. BARUCH
SALLY A. BUCKMAN
NANCY L. WOLF
DAVID S. KEIR
DEBORAH R. COLEMAN
NANCY A. ORY
ROSS G. GREENBERG
H. ANTHONY LEHV
JOHN D. POUTASSE
CHRISTOPHER J. SOVA
PHILIP A. BONOMO
JUAN F. MADRID
JANET Y. SHIH

TELEPHONE
(202) 429-8970
TELECOPIER
(202) 293-7783

December 18, 2000

WWW.LSL-LAW.COM

RECEIVED
DEC 18 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WRITER'S DIRECT DIAL
202-416-6755

WRITER'S DIRECT FAX
202-429-4603

WRITER'S E-MAIL
BGARDNER@LSL-LAW.COM

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: **MM Docket No. 00-167**
Children's Television Obligations of
Digital Television Broadcasters

Dear Ms. Salas:

Transmitted herewith on behalf of Sesame Workshop are an original and nine copies of its Comments in the above-referenced proceeding.

Diskettes containing these Comments are being submitted to Ms. Wanda Hardy and to the Commission's copy contractor under separate cover.

Respectfully submitted,

Barbara K. Gardner

Barbara K. Gardner

Enclosures

No. of Copies rec'd
List ABCDE

049

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

DEC 18 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Children's Television Obligations
of Digital Television Broadcasters

)
)
)
)

MM Docket No. 00-167

To: The Commission

COMMENTS OF SESAME WORKSHOP

Daniel J. Victor, Esq.
Executive Vice President and General Counsel
Sesame Workshop
1 Lincoln Plaza
New York, NY 10023
(212) 875-6361

Barbara K. Gardner, Esq.
Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, NW
Suite 600
Washington, DC 20006
(202) 429-8970

December 18, 2000

TABLE OF CONTENTS

SUMMARY	ii
I. INTRODUCTION.....	2
II. EDUCATIONAL AND INFORMATIONAL PROGRAMMING REQUIREMENTS	3
A. Congress And The Commission Have Established Requirements For DTV And For The Provision Of Educational Programming That Should Guide The Application Of The Children’s Television Act To DTV	4
B. The Current Three-Hour Processing Guideline Should Be Imposed On Each Broadcaster’s Primary Digital Program Signal.....	7
C. A Three-Percent “Proportional Hours” Children’s Educational Programming Requirement Should Apply To DTV Broadcasters’ Non-Primary Program Streams, To Be Implemented Flexibly.....	11
D. The “Pay Or Play” Or “Menu Approach” Options Should Be Limited To Fulfillment Of The Three-Percent Supplemental Programming Obligation.....	16
III. CAN THE EFFECTIVENESS OF CHILDREN’S EDUCATIONAL PROGRAMMING BE IMPROVED?	17
A. Research Continues To Confirm The Effectiveness Of Educational Television Programming Such As Sesame Street, And Its Attractiveness To Children	19
B. The FCC Should Not Adopt A Requirement To Use Digital Capabilities To Provide Content Ratings Or Educational Programming Qualification Information.....	20
C. Mandatory Promotion Of Core Programming Will Help Achieve The Goals Of The Children’s Television Act	21
IV. COMMERCIAL LIMITS	22
A. Direct Links To “Mixed-Use” Internet Sites Should Be Permitted During Children’s Programming, So Long As The Site Avoids Host Selling.....	23
B. The FCC Should Not Include Promotions, Public Service Announcements, Or Sponsored Educational Spots Within The Definition Of Commercial Matter	25
V. CONCLUSION.....	27

SUMMARY

When Sesame Workshop (formerly Children's Television Workshop) created the television series *Sesame Street* thirty-one years ago, we acted on the belief, then radical but since embodied in the Children's Television Act (the "CTA") itself, that television could serve the best interests and highest possibilities of all children. Today, based on our experience of more than three decades in researching and creating not only children's television programming of proven educational, social and entertainment value, but educational products of all kinds utilizing new and emerging formats and technologies, we urge the Commission to capitalize on digital television's enhanced transmission capability to fulfill television's great potential to educate and inform our children. At the same time, we ask the Commission to refrain from imposing new commercial requirements that, however well intended, will operate at cross-purposes with the CTA's and the Commission's educational programming objectives.

Clearly, the advent of digital television, with its potential for multicasting, will only exacerbate the crowded children's television environment which greater cable and DBS penetration have helped create. Accordingly, the Commission should apply its current three-hour educational programming guideline to digital television ("DTV") in a manner that is most likely to enable parents to become aware of, and find, programming broadcast to fulfill the guideline. That goal is best achieved by requiring the broadcast of three hours of core programming (defined as set forth in the Commission's Rules) on each DTV licensee's primary free digital signal. The Commission recently reached a similar conclusion when it decided to require direct broadcast satellites to aggregate their required educational programming on a single channel, to make it easier for consumers to locate such programming.

We also suggest that the technical format for DTV programming aired in fulfillment of the three-hour guideline be required to be, at a minimum, consistent with the predominant format of the primary program stream.

In addition to requiring that the *three-hour* educational programming guideline be applied directly to each DTV licensee's primary program signal, Sesame Workshop believes that licensees should be required to devote *three percent* of all their additional digital transmission hours during the 7 a.m. to 10 p.m. time period to educational and informational children's programming. This supplemental programming could be broadcast on any one, or more than one, of the licensee's digital program streams, provided that:

- the programming meets all the current scheduling, duration, information dissemination and other requirements for core programming;
- the programming is adequately promoted on the licensee's primary free program channel; and
- the programming's technical format (including its resolution) meets or exceeds the quality of the predominant format of the program stream in which it is offered.

In contrast, a requirement that *each* program stream include core children's programming would unreasonably interfere with licensees' ability to utilize DTV capacity for subscription and data services. More important, a per-channel core programming transmission requirement would not advance the objectives of the CTA in any event, since parents and children would be unable to view these programs without special reception equipment and/or the payment of subscription fees.

The "Pay or Play" and "Menu Approach" options, under which broadcasters could pay others, particularly public broadcasters, to air core programming on their behalf, should be available only with respect to the three-percent supplemental requirement we have proposed, because these options circumvent the CTA's chief purpose of increasing the amount of

educational and informational children's programming on commercial television. *There should be no ability to buy one's way out of the basic three-hour core programming requirement which should be fulfilled on each licensee's primary DTV program stream.*

In addition to examining how its children's educational programming rules should be applied to digital television broadcasters, the Commission in this proceeding more generally seeks comment on the effectiveness of those rules in implementing the CTA's goals, and on additional steps the agency should take to promote educational and informational children's programming and improve its quality. The Commission also inquires whether the advanced capabilities of digital broadcasting can be used to help implement the CTA.

Our research, and that of others, has long confirmed the educational effectiveness of such programs as *Sesame Street*, and their attractiveness for children. However, we do not believe that the required use of datacasting to make ratings or other information on core programming available to consumers is an appropriate use of broadcasters' resources, or will significantly increase viewership of educational programming. Instead, we believe more traditional means of promoting such programming should be fostered, including during prime time. In addition, we support the notion of government-subsidized children's programming so that small, independent producers, like Sesame Workshop, may have the financial latitude to compete with large production companies.

Regarding commercialization practices on children's television, Sesame Workshop opposes the suggestions to ban direct links to Internet sites that contain commercials, to count such links toward the commercial limits, and to include within the definition of commercial matter such short-form program materials as program promotions, public service announcements ("PSAs"), and sponsored educational interstitials.

When it adopted rules implementing the CTA's commercial limits in 1991, the Commission recognized that products such as toys, books, magazines, games and computer software can extend the educational benefits of the children's television programs with which they are associated, and play an educational role in child development. Accordingly, the Commission declined to adopt a restrictive definition of program-length children's commercials that "would jeopardize highly acclaimed children's shows such as Sesame Street. . .that have products associated with them," and "would limit revenues from merchandising which are an important source of production funding. . . ."

The same reasoning applies in the present context. Links to "mixed-use" websites that sell products associated with the program in which the links appear should be encouraged rather than prohibited, since Internet sites offering content related to children's TV program series are a valuable means of enhancing the educational value of the related series, of cementing loyalty to the series, and of thus promoting the educational objectives of the CTA. For example, when entering the newly redesigned site for Sesame Workshop's *Dragon Tales*, children select one of the four main dragon characters and, through Flash animation, fly into Dragon Land on the back of that character. Once there, children can choose from a variety of fun and enriching activities, each of which ties directly to a primary goal of the television program: to encourage children to pursue and overcome challenges.

Thus, we believe that direct links to a "mixed-use" Internet site should be permitted if the site has the following characteristics:

- it is not primarily intended to offer e-commerce services;
- it offers a substantial amount of *bona fide* program-related content;
- the site's home page and other menu pages are clearly labeled to demarcate the content sections from the e-commerce sections; and

- the “hot” link from the television screen does not take the viewer directly to the e-commerce section of the site.

Finally, Sesame Workshop strongly disagrees with the Commission’s suggestion that the definition of commercial matter, “air time sold for purposes of selling a product or service,” should be altered to include promotions of upcoming programs, PSAs, and sponsored educational spots, in order to force program producers to expand the amount of time devoted to program material. Even assuming the Commission has authority to involve itself in the creative process to the extent of manipulating the length of long-form television programming, the particular proposals at issue would, if enacted, hinder television’s ability to educate children, and thus contravene the intent of the CTA and the objective of the instant proceeding to *improve* educational programming.

For example, including program promotions in the commercial matter category would tend to discourage the broadcast of such materials, notwithstanding that elsewhere in the *Notice* the Commission proposes to make additional promotions of core programs mandatory (an idea we applaud because it will make it easier for children and parents to learn what programming is available). Similarly, PSAs and short-form educational children’s programming offer significant learning value; they should be fostered, not stifled.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Children's Television Obligations)	MM Docket No. 00-167
of Digital Television Broadcasters)	

To: The Commission

COMMENTS OF SESAME WORKSHOP

Sesame Workshop, by its attorneys, hereby comments on the Commission's Notice of Proposed Rule Making in the captioned proceeding (FCC 00-344 rel. Oct. 5, 2000) ("*Notice*"), applying the Children's Television Act¹ to digital television broadcasting. We urge the Commission to capitalize on digital television's enhanced transmission capability to fulfill television's great potential to educate and inform our children. At the same time, we ask the Commission to refrain from imposing new commercial requirements that, however well intended, will operate at cross-purposes with the CTA's and the Commission's educational programming objectives.

¹ Pub. L. No. 101-437, 104 Stat. 996, *codified at* 47 U.S.C. §§ 303a, 303b, 394 (the "CTA").

I. INTRODUCTION

Sesame Workshop (formerly Children's Television Workshop) began thirty-one years ago with one outstanding program innovation in educational media — the television series *Sesame Street*. We acted on the belief, then radical but since embodied in the Children's Television Act itself, that television could serve the best interests and highest possibilities of all children. We found a way to channel children's natural attraction to what was then a new electronic medium in a positive and constructive way. And rather than just create a clever and well-produced show, we based every aspect of our work on knowledge about how children learn. We grounded our work, and still do, in research to expand our understanding of what appeals to children and what helps them learn, develop and grow. Sesame Workshop changed the medium forever with its now legendary series, *Sesame Street*, the first of our many award-winning educational program series for children.

But we did not stop with conventional analog television: part of the Workshop's mission is to investigate, test and utilize new and developing technologies for their ability to create educational value for children. For many years, we have been in the forefront of producing computer software and other interactive products that both teach and entertain. Our current interactive product line offers almost two dozen Sesame Street titles, such as Elmo's Deep Sea Adventure and Ernie's Adventure in Space — new products that help children with critical thinking and problem-solving skills. Our newly launched website, sesamestreet.com, has seen a 76% increase in visits this fiscal year and we're pleased that Passport Kids, a global online community we developed with Intel that connects kids around the globe, has been honored by the Smithsonian's National Museum of American History. Noggin, our 24-hour children's educational cable channel created in partnership with Nickelodeon, has seen stunning growth, up

from 4 million subscribers in 1999 to an expected 14.5 million in December 2000. Noggin and its website, noggin.com, are delivering on their promise to create one channel on two screens by converging on-screen and online content. In addition, we are preparing to pioneer the first e-book for toddlers, in collaboration with Microsoft.

Based on our experience of more than three decades in researching and creating not only children's television programming of proven educational, social and entertainment value, but educational products of all kinds utilizing new and emerging formats and technologies, the Workshop is uniquely qualified to comment on the Commission's proposals to apply the CTA to digital television ("DTV"). We share the Commission's goal of maximizing television's power to help children reach their highest potential, and hope to provide useful commentary on how best to do so.

II. EDUCATIONAL AND INFORMATIONAL PROGRAMMING REQUIREMENTS

Sesame Workshop agrees with the Commission that digital broadcasters are subject to the CTA's educational and informational programming requirements, including the three-hour "core" educational programming processing guideline. Addressing the application of the guideline to digital television, the *Notice* poses numerous implementation issues in light of the opportunities presented by DTV to deliver multiple program streams, utilize various technical formats, and offer subscription as well as free broadcast and other services. In our view, these questions should not be addressed in a vacuum, but are best considered in the context of existing regulatory frameworks for DTV and for children's and other educational programming. These, in turn, suggest solutions to the Commission's inquiries.

A. Congress And The Commission Have Established Requirements For DTV And For The Provision Of Educational Programming That Should Guide The Application Of The Children's Television Act To DTV.

As the *Notice* recites, the CTA requires the FCC to consider the extent to which television licensees have served children's educational and informational needs through their overall programming, including programming specifically designed to serve those needs (now called "core" programming).² The FCC adopted its current three-hour processing guideline in 1996 to implement the CTA's core educational programming requirement.³ At the same time, the Commission enacted relatively clear eligibility requirements for programming that could be counted toward the guideline,⁴ and adopted a number of mandatory information-dissemination provisions intended to make parents and children aware of when and where educational children's programming is broadcast.⁵

Amy Jordan is an expert who considers the core programming guideline to be working, if imperfectly:

For three years, the FCC has mandated that broadcasters wishing expedited review of their license renewal applications air a minimum of three hours a week of educational programming for children ages 16 and under. For three years, the local broadcast stations have responded by airing three hours' worth of network-provided and syndicated programming between the hours of 7:00 a.m.

² *Notice* at 3.

³ See 47 C.F.R. § 73.671 Note 2, adopted in *Policies and Rules Concerning Children's Television Programming, Report and Order*, 11 FCC Rcd 10,660 (1996).

⁴ See 47 C.F.R. § 73.671(c) (A "core" program is a television program that is specifically designed to serve the educational and informational needs of children 16 and under. It must be a regularly scheduled weekly program at least 30 minutes in duration that is aired between the hours of 7:00 a.m. and 10:00 p.m., has education as a significant purpose, and is identified as a children's educational and informational program to publishers of program guides. Its educational objective and target audience age must be listed in the station's Form 398 Children's Television Programming Report.).

⁵ See 47 C.F.R. § 73.673.

and 10:00 p.m. Our yearly analyses reveal that the majority of these programs meet the letter (and sometime even the spirit) of the FCC's mandate. The programs tend to have clear, age-appropriate lessons and little, if any, violence. Though there is clearly room for improvement -- most programs in this year's sample were judged to be "moderately educational," -- broadcasters have made a solid effort to increase the quality and availability of educational programming since the introduction of the mandate.

Amy B. Jordan, *Is the Three-Hour Rule Living Up to Its Potential?*, The Annenberg Public Policy Center of the University of Pennsylvania (2000), at 27. According to Ms. Jordan, the three "key areas of concern" that remain are the limited educational value of some programs, the irregular scheduling of core programming on some stations, and parents' lack of awareness of the three-hour guideline and of commercial broadcasters' core educational programming. *Id.* at 27-28.

Two years after its successful reinterpretation of the CTA's educational programming provisions in 1996, the FCC implemented a different statute which requires that direct broadcast satellite ("DBS") providers — who, like digital television broadcasters, supply multiple program streams to each home they serve — devote four to seven percent of their channel capacity to noncommercial educational programming.⁶ The Commission determined that discrete channels, rather than a percentage of cumulative time, should be reserved for such programming, chiefly to assure continuity and predictability for consumers.⁷ The FCC requires each DBS licensee to determine capacity for purposes of quantifying the set-aside channels by calculating the number of channels available for video programming on all its satellites every

⁶ 47 U.S.C. § 335(b)(1).

⁷ See 47 C.F.R. § 100.5(c)(5)(iv); *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order*, 13 FCC Rcd 23,254, 23,282 (1998) ("DBS Order").

quarter, and then using the yearly average of these quarterly measurements to ascertain the total number of reserved channels.⁸

Finally, the regulatory framework for DTV itself also should inform the Commission's decisions in the current proceeding. This framework remains fluid, but this much is known: First, Congress has insisted that television broadcasters seeking renewal of their licenses must establish that *all* their digital program services, including those which are ancillary or supplementary to their primary free program service, are operated in the public interest.⁹

Second, the FCC has determined that at any time that a DTV licensee transmits a video program signal on its analog television channel, it must also transmit at least one over-the-air DTV video program signal at no direct charge to viewers.¹⁰ Also, beginning on April 1, 2003, DTV licensees must simulcast 50 percent of the video programming of the analog channel on the free over-the-air DTV channel,¹¹ with the required percentage increasing to 75% on April 1, 2004, and to 100% commencing one year later.¹²

In addition, DTV licensees will have mandatory cable carriage rights whose parameters the Commission has yet to establish.¹³ Although ancillary or supplementary services

⁸ 47 C.F.R. § 100.5(c)(1); *DBS Order* at 23,284.

⁹ 47 U.S.C. § 336(d). Where spectrum is used for commercial purposes, a fee is imposed to recover for the public a portion of the value of the public spectrum resource made available for such use. 47 U.S.C. § 336(e).

¹⁰ 47 C.F.R. § 73.624(b).

¹¹ 47 C.F.R. § 73.624(f)(1); *Advanced Television Systems, Fifth Report and Order*, 12 FCC Rcd 12,809, 12,832-33 (1997).

¹² 47 C.F.R. § 73.624(f)(2), (3). The simulcasting requirement terminates when the licensee is required to return either its analog or its digital channel to the FCC. 47 C.F.R. § 73.624(f)(4).

¹³ See *Service Rules for the 746-764 and 776-794 MHz Bands*, 21 Communications Reg. (P&F) 131, 149 (2000); *Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rule Making*, 13 FCC Rcd 15,092 (1998).

will have no such rights,¹⁴ it can be assumed that at least the primary digital television program stream will be required to be carried.¹⁵

In short, the existing regulatory framework for DTV establishes the primacy of a single free over-the-air programming stream, but views all of the spectrum allotted to the broadcaster as a public resource subject to regulation in the public interest. As a result, Sesame Workshop recommends that the Commission adopt a modified version of the “Proportional Hours” approach suggested by Children Now:¹⁶ a requirement that the current three-hour quantitative guideline apply to the digital broadcaster’s primary program stream, while an additional three-percent proportional requirement be flexibly applied to the broadcaster’s additional digital transmissions.

B. The Current Three-Hour Processing Guideline Should Be Imposed On Each Broadcaster’s Primary Digital Program Signal.

Sesame Workshop urges the Commission to apply its existing three-hour children’s educational programming guideline to each digital broadcaster’s primary free programming stream. This approach will best implement the goals of the CTA, while offering the advantages of certainty to licensees and ease of administration to the Commission.

As suggested above, among the primary problems that researchers have observed in evaluating whether the three-hour guideline is working is that parents are unable to take

¹⁴ 47 U.S.C. § 336(b)(3).

¹⁵ *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd at 15,124-25. Mandatory DBS carriage rights will also be available to DTV broadcasters in certain circumstances. *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Report and Order*, FCC 00-417 (rel. Nov. 30, 2000).

¹⁶ *See Notice* at 8.

advantage of it — first, because they remain unaware of the guideline and the programming intended to comply with it, and second, because they “need to have a sense that the programs they want to watch will consistently be there.”¹⁷ As one study put it,

What is clear is that parents do not know enough about what’s available, what’s educational and why it matters to consistently mediate their children’s television viewing choices. . . .

[This] finding. . . is not surprising giving the intensely competitive and crowded environment of children’s television.

Amy B. Jordan, *The Three-Hour Rule: Insiders’ Reactions*, The Annenberg Public Policy Center of the University of Pennsylvania (1999), at 24, 21 (emphasis in original).

Clearly, the advent of digital television, with its potential for multicasting, will only exacerbate this “crowded environment of children’s television” which greater cable and DBS penetration have helped create. Accordingly, the Commission should apply the three-hour guideline to DTV in a manner that is most likely to enable parents to become aware of, and find, educational programming broadcast to fulfill the guideline. That goal is best achieved by requiring the broadcast of three hours of core programming (defined as set forth in the Commission’s Rules) on each DTV licensee’s primary free digital signal, for the following reasons:

First, the Commission’s Rules require a digital signal to be broadcast free of charge whenever the analog signal is transmitted, but only a *single* digital signal.¹⁸

¹⁷ Amy B. Jordan, *Is the Three-Hour Rule Living Up to Its Potential?*, The Annenberg Public Policy Center of the University of Pennsylvania (2000), at 28.

¹⁸ 47 C.F.R. § 73.624(b).

Second, this primary digital signal will be utilized to simulcast 50 percent of the analog signal commencing on April 1, 2003, 75 percent commencing April 1, 2004, and 100 percent from April 1, 2005 until the analog channel terminates operation.¹⁹

Third, it is possible, or even probable, that cable systems and DBS providers will be required to carry, pursuant to the mandatory DTV carriage rules that the Commission must enact, only a single digital program stream transmitted by DTV broadcasters.²⁰

Fourth, as noted above, multicasting creates greater potential for viewer confusion, as program choices multiply.

For these reasons, parents will be best able to find broadcasters' digital educational children's programming during the DTV transition if that programming is identical to, and simulcast with, the programming carried on the analog channel in fulfillment of the three-hour guideline. Following the transition, the requirement should not change: parents will expect to continue to find three weekly hours of core educational programming on each broadcaster's primary DTV program signal.

The Commission has already reached a similar conclusion in a similar context—that of determining “whether Section 335(b) [the four to seven percent statutory setaside for educational programming] requires that discrete channels or a percentage of cumulative time be reserved”²¹ on direct broadcast satellites. The FCC decided to require that discrete channels be reserved, because

using specific channels, rather than randomly placing educational and informational programming [on any

¹⁹ 47 C.F.R. § 73.624(f).

²⁰ *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd at 15,124-25.

²¹ *DBS Order*, 13 FCC Rcd 23,254 at 23,281.

channel], will assure continuity, predictability and easier monitoring and enforcement. Requiring the set aside of discrete channels will make it easier for consumers to locate such programming. . . . We will require DBS providers to ensure that programming is offered on consistent channels at consistent times in order to provide continuity and predictability for viewers.

DBS Order, 13 FCC Rcd at 23,282.²² Sesame Workshop submits that a comparable requirement for DTV broadcasters, who will have the ability to transmit not 100-plus channels but at most four to six simultaneous program streams, is to require that the three-hour guideline be implemented on the primary DTV program signal, which is the signal consumers will most readily be able to locate.²³

Replicating the present three-hour analog requirement on the DTV licensee's primary program channel will also insure that at a minimum, and with little effort on broadcasters' part, the same amount of educational and informational children's programming as is currently broadcast on analog TV will continue to be available, both during and after the DTV transition. Licensees can implement this proposal virtually automatically. In addition, the current vehicle for licensee reporting of educational children's programming (and for FCC and public review thereof), FCC Form 398, would require only minor modification to accommodate this proposal.

To address the Commission's legitimate concern that core programming not be relegated to the lowest-quality technical format offered by digital television licensees,²⁴ we

²² See also 47 C.F.R. § 100.5(c)(5)(iv) ("DBS providers shall reserve discrete channels and offer these to qualifying programmers at consistent times to fulfill the reservation requirement described in these rules.").

²³ In addition to the possibility that only one program stream per local DTV broadcaster will be carried on cable and DBS, it is quite likely that daily newspapers and other TV program guide publishers may list the DTV programming of only one digital channel per broadcaster.

²⁴ Notice at 8-9.

suggest that the format for DTV programming aired in fulfillment of the three-hour guideline be required to be, at a minimum, consistent with the predominant format of the primary program stream.²⁵

Sesame Workshop further proposes that so long as DTV licensees broadcast three weekly hours of core programming on their primary free program channel as described above, they be permitted to fulfill our proposed additional three-percent component of the CTA programming obligation on *any one or more* DTV program streams.

C. A Three-Percent “Proportional Hours” Children’s Educational Programming Requirement Should Apply To DTV Broadcasters’ Non-Primary Program Streams, To Be Implemented Flexibly.

In addition to requiring that the *three-hour* educational programming guideline be applied directly to each DTV licensee’s primary program stream, Sesame Workshop believes that these licensees should be required to devote *three percent* of their additional digital transmission hours during the 7 a.m. to 10 p.m. time period (the period available for core programming) to educational and informational children’s programming -- to be broadcast on any one, or more than one, of the licensee’s digital program signals.

As noted, Congress has required that all ancillary or supplementary DTV services be operated in the public interest, and that FCC rule violations with respect to these services shall reflect on the licensee’s qualifications for license renewal.²⁶ Accordingly, it appears that Congress does not intend that licensees treat their ancillary DTV spectrum as private property

²⁵ Although we agree with the concept (suggested by Children Now) “that core programming be offered with the same proportion of technological advances that the broadcaster chooses to use in its overall programming” (*Notice* at 9 n.46), the proposed required calculation of “digital viewer experience quality” is, in our view, too complex to be workable.

²⁶ 47 U.S.C. § 336(d).

from which they can derive revenue without regulatory consequence, but instead as subject to the “public trustee” licensing concept.

We thus agree with Children Now that an amount of children’s educational programming proportional to the three-hour guideline that currently applies to each broadcaster’s single analog television channel should be required with respect to all multicast digital transmissions. Specifically, the Commission should require that three percent of the total hours transmitted between 7 a.m. and 10 p.m. over all digital program streams, *including subscription and data transmissions but excluding the primary program channel* (which would be subject to the current three-hour guideline, as described above), must be devoted to educational and informational programming for children.²⁷ However, as explained below, Sesame Workshop would permit this supplementary educational programming to be aggregated on any one or more digital program streams offered by the broadcaster.

As reported in the *Notice*, Children Now would require broadcasters to report their three-percent calculations in the quarterly Children’s Television Programming Reports, with each quarterly calculation determining the broadcaster’s obligation for the following quarter.²⁸ This suggestion is not workable, in that programming commitments for a given calendar quarter must be made far earlier than at the end of the immediately preceding quarter. Instead, the Commission might utilize a variant of the mechanism it adopted for DBS licensees

²⁷ As stated in the *Notice*, this three percent figure is derived by dividing the current three-hour guideline by 105, which is the total number of hours per week available for core programming during the required 7 a.m. to 10 p.m. broadcast window. *Notice* at 8.

²⁸ *Id.*

to calculate their four-percent setaside requirement for educational programming, namely, an annual average of four quarterly measurements.²⁹

Since Congress clearly contemplated that digital television licensees should have the opportunity to offer subscription, datacasting and other transmission services not receivable over the air or free of charge, there is little reason to require that such program streams each actually include the transmission of core educational children's programming. Such a requirement would unreasonably interfere with licensees' ability to utilize this capacity for the desired subscription and data services. More important, a per-channel core programming transmission requirement would not advance the objectives of the CTA in any event, since parents and children would be unable to view these programs without special reception equipment and/or the payment of subscription fees.

Sesame Workshop therefore urges the Commission to allow digital television broadcasters to fulfill the proposed three-percent supplemental core educational programming requirement on *any* digital program stream or combination of digital program streams, including the primary free over-the-air channel (which will already carry three weekly hours of such programming). Such flexibility should only be permitted, however, if the following three conditions are met:

- the programming meets all the current scheduling, duration, information dissemination and other requirements for core programming;³⁰
- the programming is adequately promoted on the licensee's primary free program channel; and

²⁹ 47 C.F.R. § 100.5(c)(1); *DBS Order*, 13 FCC Rcd at 23,284.

³⁰ See 47 C.F.R. §§ 73, 671, 73.673.

- the programming's technical format (including its resolution) meets or exceeds the quality of the predominant format of the program stream in which it is offered.

These conditions are necessary in order to implement meaningfully the goal of the CTA – to increase the amount of children's educational and informational programming on television.³¹ *First*, the programming must qualify as core programming, as defined in the Commission's Rules, since the three-hour guideline applies to such programming and the objective of the present proceeding is to apply that guideline to DTV.³²

Second, in order for consumers to be able to view these supplemental educational offerings, parents and children must be made aware of their existence, and where to find them. As noted above, even in the current one-channel-per-broadcaster television universe, a major failing of the three-hour guideline is that too many parents are unaware of it. In the future multicasting environment, information dissemination will become even more critical if the programming in question is going to be watched (and if it is not, there is, of course, no point in requiring that it be broadcast.).

Therefore, in addition to the public information initiatives currently required for core programming, any such programming that will be transmitted on a digital program stream other than the primary free over-the-air program stream should be required to be actively promoted on that primary program signal. The mandatory promotional announcements should include information about the program's content as well as where and when it can be found, and

³¹ S. Rep. No. 101-227, at 1 (1989) ("*Senate Report*"), cited in *Notice* at 3.

³² *Notice* at 7. In this connection, modification of FCC Form 398, the Children's Television Programming Report, will also be required.

should be broadcast at times when parents and children are likely to be viewing the primary channel.³³

Finally, as noted above, Sesame Workshop also believes that the Commission is legitimately concerned that broadcasters “not segregate core programming consistently to the lowest possible audio/visual quality offered by the broadcaster.”³⁴ We therefore would require that DTV licensees’ ability to implement the three-percent supplementary core programming obligation flexibly also be conditioned on a requirement to broadcast all core programming offered in fulfillment of that obligation in a technical format whose quality meets or exceeds the predominant technical quality of the program stream in which each core program is transmitted.

If all three of the proposed conditions are met, the CTA’s goal of promoting greater availability of programming specifically designed to educate and inform children will be advanced. At the same time, licensees will have maximum flexibility in programming and formatting their digital channels (both free and subscription-based), which may even prove to be an incentive to aggregate all of their programming offered in fulfillment of the three-percent requirement on a single channel. Such consolidation could benefit consumers by establishing, on commercial television, a “home” for high-quality, beneficial children’s programming akin to children’s programming blocs now aired on noncommercial television.

³³ The Commission might initially allow licensees themselves to determine the frequency and duration of such announcements, and require them to certify on their Children’s Television Programming Reports that these promotional efforts were made. Should experience suggest the need for more specific guidelines, the Commission could undertake that task at a later date.

³⁴ *Notice at 8-9* (footnote omitted).

D. The “Pay Or Play” Or “Menu Approach” Options Should Be Limited To Fulfillment Of The Three-Percent Supplemental Programming Obligation.

In the *Notice*, the Commission seeks comment on a “Pay or Play” model, under which broadcasters could meet their core programming obligation by paying others, particularly public broadcasters, to air the required programming for them.³⁵ Alternatively, a “Menu Approach” is suggested, whereby licensees could elect to satisfy the core programming requirement through a combination of over-the-air broadcasting, broadband or datacasting services to schools, libraries, or community centers serving children, and support for the production of children’s educational programming by noncommercial entities.³⁶

In our opinion, such options should be available only with respect to the three-percent supplemental requirement we have proposed: *There should be no ability to buy one’s way out of the basic three-hour core programming requirement which should be fulfilled on each licensee’s primary DTV program stream.*

The most important reason for thus limiting licensees’ ability to utilize the “Pay or Play” or “Menu Approach” options is that these options circumvent the chief purpose of the CTA, which was to increase the amount of educational and informational children’s programming on commercial television. Congress found insufficient educational programming on *commercial* stations, not on noncommercial outlets.³⁷

The Commission itself reached a similar conclusion in 1996, when it adopted the three-hour processing guideline. Licensees were indeed given the option to rely *in part* on

³⁵ *Id.* at 9.

³⁶ *Id.* at 10.

³⁷ Senate Report at 7 (1989).

program sponsorship on other stations (or on other nonbroadcast efforts) to show compliance with the CTA, but only if they failed to meet both the “Category A” three-hour processing guideline and the “Category B” equivalent programming package test, and only on referral of their license renewal applications to the full Commission.³⁸ In thus limiting reliance on program sponsorship, the Commission recognized the importance of each licensee’s broadcasting core children’s programming on its own air.

Moreover, the opportunity to sponsor programming on other stations has existed since the CTA’s programming provisions first became effective in 1991,³⁹ yet to our knowledge this option has rarely, if ever, been utilized.⁴⁰ Since there is no reason to believe that licensees will now avail themselves of an opportunity they have heretofore shunned, the program sponsorship option should not be viewed as a viable primary means of applying the CTA’s educational programming requirements to DTV. Instead, it should be offered only as an optional means of partially fulfilling our proposed secondary core programming requirement – the three-percent obligation applicable to program streams other than the primary DTV program signal.

III. CAN THE EFFECTIVENESS OF CHILDREN’S EDUCATIONAL PROGRAMMING BE IMPROVED?

In addition to examining how its children’s educational programming rules should be applied to digital television broadcasters, the Commission more generally seeks comment on the effectiveness of those rules in implementing the CTA’s goals, and on additional steps the

³⁸ *Policies and Rules Concerning Children’s Television Programming*, 11 FCC Rcd at 10,724 (1996).

³⁹ *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 2111, 2115-16 (1991).

⁴⁰ It is within the Commission’s ability to determine recent utilization of this option by examining licensees’ responses to Question 9 of the Children’s Television Programming Report, which requires information on each core program sponsored by the respondent.

agency should take to promote educational and informational children's programming and improve its quality.⁴¹ The Commission also inquires whether the advanced capabilities of digital broadcasting can be used to help implement the CTA.⁴²

Our research, and that of others, has long confirmed the educational effectiveness of such programs as *Sesame Street*, and their attractiveness for children. However, we do not believe that the required use of datacasting to make ratings or other information on core programming available to consumers is an appropriate use of broadcasters' resources, or will significantly increase viewership of educational programming. Instead, we believe more traditional means of promoting such programming should be fostered. In addition, as detailed in Section IV below, the Commission should not impose anti-commercialization requirements that run counter to its efforts to promote educational programming: it should, for example, encourage rather than attempt to suppress the on-air promotion of Internet sites that contain significant content intended to enhance the television viewing experience, even if the site contains some commercial matter.

The Workshop also supports the notion of government-subsidized children's programming so that small, independent producers, like Sesame Workshop, may have the financial latitude to compete with large production companies.

⁴¹ Notice at 16.

⁴² *Id.* at 10-11.

A. Research Continues To Confirm The Effectiveness Of Educational Television Programming Such As *Sesame Street*, And Its Attractiveness To Children.

There should be no lingering question that educational programming can both engage and teach children, in furtherance of the goals of the CTA. Data collected over thirty years stands as powerful testament to the potential for television in general, and *Sesame Street* in particular, to entertain and educate preschool-age children around the world. A recent review of this data⁴³ revealed several striking points:

- *Sesame Street* has been effective in encouraging a broad range of cognitive and social skills, including, for example, literacy, prosocial behavior, mathematics skills, positive race relations, and even an understanding of death;
- Effects have been found to last for as long as 10 to 12 years, with measurable differences between viewers and nonviewers of *Sesame Street* appearing as late as high school;
- Effects in other cultures have been consistent with those found in the United States; and
- Effects have been consistent over a period of decades, likely because *Sesame Street*'s production techniques and formats are constantly updated to reflect the current state of the art.⁴⁴

In addition, it has been demonstrated that children will watch well-produced educational programming. Currently, for example, *Sesame Street* and the Workshop's *Dragon Tales* are two of the five most popular public television programs for preschoolers. In the October 2000 sweeps, *Dragon Tales* was the highest-rated PBS children's show among children

⁴³ Shalom M. Fisch, Rosemarie T. Truglio, and Charlotte F. Cole, Children's Television Workshop, *The Impact of Sesame Street on Preschool Children: A Review and Synthesis of 30 Years' Research*, I Media Psychology 165 (Lawrence Erlbaum Associates, Inc. 1999).

⁴⁴ *Id.* at 186.

2-5. In addition, *Sesame Street* improved its time period performance among the same age group by 26% from the October 1999 sweep to the October 2000 sweep.

Obviously, there is only one *Sesame Street*, and the recent Annenberg analysis of the three-hour rule during the 1999/2000 broadcast season concludes that most programs in the current sample were judged to be only “moderately educational,” with a small minority — one-fifth to one-fourth of the programs labeled as core programming — having “little educational value.”⁴⁵ Nevertheless, the report’s author finds that “broadcasters have made a solid effort to increase the quality and availability of educational programming” since the introduction of the three-year guideline.⁴⁶

B. The FCC Should Not Adopt A Requirement To Use Digital Capabilities To Provide Content Ratings Or Educational Programming Qualification Information.

The Commission seeks comment on whether it should require digital television broadcasters to use datacasting to explain, during core children’s programs, why the programs qualify as such, or whether it should require broadcasters to provide content ratings information on core programs from independent sources, perhaps through direct Internet links.⁴⁷ Sesame Workshop opposes such proposals, whose costs would far exceed their benefits.

⁴⁵ Amy B. Jordan, *Is the Three-Hour Rule Living Up to Its Potential?*, The Annenberg Public Policy Center of the University of Pennsylvania (2000), at 27.

⁴⁶ *Id.*

⁴⁷ *Notice* at 10-11.

Whether in the form of a “crawl” across the bottom of a television screen, a link to the Internet, or some other on-screen manifestation, information that labels a program as educational may be helpful to parents, but can “turn off” children and stigmatize the programs to which they are attached. Programs that children perceive to be “eat-your-spinach-it’s good-for-you-TV” tend not to be watched, in our experience.⁴⁸

A requirement to convey third party content ratings information to viewers would be an unnecessary intrusion on licensee discretion and an only marginally helpful tool for parents. In addition, both this and the datacasting proposal would be both costly and time-consuming to implement.

In sum, the proposed required use of digital technology to give “preferential” treatment to core children’s programming will not achieve an increase in the viewership of such programs. What will do so is better-produced programs that engage children’s attention and imagination, and more on-air promotion of such programs.

C. Mandatory Promotion Of Core Programming Will Help Achieve The Goals Of The Children’s Television Act.

The FCC should require that broadcasters promote their educational children’s programs at least as often as they promote non-educational shows. Promotion should be required not only during children’s program time periods, but during prime time as well, so that parents as well as children will become aware of these programs.

⁴⁸ For this reason, Sesame Workshop opposed the Commission’s 1995 proposal to require on-air identification of core programs, including through the use of icons. Although the proposal was nevertheless adopted (*see* 47 C.F.R. § 73.673), the fact that the Commission allows licensees to select any form they desire for the on-air educational identifier has resulted in a wide variety of such identifiers and has tended to mitigate the adverse effects of the requirement.

Previously in these Comments, we have called attention to researchers' findings that parents are unaware of the three-hour guideline in general, and the identity and broadcast times of individual core program series in particular. At the same time, we have opposed the imposition of a requirement that datacasting or Internet links be used to label or rate core programs. Instead, we believe that the proven way to attract children — program promotions — should be utilized to drive viewership to core educational program offerings, just as they are used to drive children to entertainment shows. Moreover, core programming promotions might well include contests and sweepstakes, which are known to successfully drive viewership and foster program loyalty with respect to commercial children's entertainment programming.

Research has also indicated that when families watch television together, they typically view adult or general audience programs, not children's shows.⁴⁹ This finding suggests that promotion of core programming should be required not only when children's programs are aired, but during prime time and fringe periods as well.

The Commission should also forego the anti-commercialization proposals it is considering that will work at cross-purposes to the objective of increasing the audience for core programming.

IV. COMMERCIAL LIMITS

Sesame Workshop opposes the suggestions to ban direct links to Internet sites that contain commercials, to count such links toward the commercial limits, and to include within the

⁴⁹ Kelly L. Schmitt, *Public Policy, Family Rules and Children's Media Use in the Home*, The Annenberg Public Policy Center of the University of Pennsylvania (2000), at 45.

definition of commercial matter such short-form program materials as program promotions, public service announcements (“PSAs”), and sponsored educational interstitials.

A. Direct Links To “Mixed-Use” Internet Sites Should Be Permitted During Children’s Programming, So Long As The Site Avoids Host Selling.

In the *Notice*, comment is invited on a proposal by the Center for Media Education *et al.* (“CME”) that the Commission prohibit all direct links to commercial websites during children’s programming.⁵⁰ We believe this proposal lacks merit as to Internet sites that contain both program-related and commercial content, and we would oppose counting links to such “mixed-use” sites as commercial matter. However, we agree that host selling on a website linked to a children’s program should be avoided.

If by a “commercial” website, CME and the Commission mean a site that is entirely or even primarily involved in selling products and services, then Sesame Workshop agrees that when future technology permits direct links from the television screen to the Internet, such links to commercial websites from programs directed to children twelve and younger should be barred. However, we believe that direct links to a “mixed-use” site should be permitted, if the site has the following characteristics:

- it is not primarily intended to offer e-commerce services;
- it offers a substantial amount of *bona fide* program-related content;
- the site’s home page and other menu pages are clearly labeled to demarcate the content sections from the e-commerce sections; and
- the “hot” link from the television screen does not take the viewer directly to the e-commerce section of the site.

⁵⁰

Notice at 13-14.

Links to such mixed-use sites should not be deemed to be commercial matter, because children capable of activating the link will not be toddlers; rather, they will be old enough to distinguish between commercial matter and other programming. Studies show that children between the ages of 6-8 can distinguish advertising from program content.⁵¹

In addition, Internet sites offering content related to children's TV program series are a valuable means of enhancing the educational value of the related series, of cementing loyalty to the series, and of thus promoting the educational objectives of the CTA. For example, when entering the newly redesigned site for Sesame Workshop's *Dragon Tales*,⁵² children select one of the four main dragon characters and, through Flash animation, fly into Dragon Land on the back of that character. Once there, children can choose from a variety of fun and enriching activities, each of which ties directly to a main goal of the television program: to encourage children to pursue and overcome challenges.⁵³

We also believe that so long as the e-commerce portions of a mixed-use website are clearly demarcated from the site's other content, the site should be permitted to sell products associated with the related television program. When it adopted rules implementing the CTA's commercial limits in 1991, the Commission recognized that products such as toys, books,

⁵¹ See, e.g., H.R. Rep. No. 101-385, at 6 (1989).

⁵² The redesigned website results from close collaboration among the online production team, researchers with first-hand knowledge of children's online behavior and preferences, and researchers integral to the production of the television show. Research is currently underway to examine the use of the redesigned site by parents and preschoolers.

⁵³ On the television program, the dragons all wear Dragon Badges around their necks that glow whenever they overcome a particular challenge. One of the activities on the new website allows children to make their own Dragon Badges. This activity reinforces the educational goals behind the program by encouraging children to pursue specific challenging experiences. Children extend the content from the television show to their own lives by choosing a challenge such as "I use my words to tell people when I get mad" or "I don't give up when something is hard to do." By printing out personalized Dragon Badges, children feel rewarded, learn, and take important messages with them even after turning off the television and computer. Thus, the new activities on the redesigned site reinforce the messages presented on television.

magazines, games and computer software can extend the educational benefits of the children's television programs with which they are associated, and play an educational role in child development.⁵⁴ Accordingly, the Commission declined to adopt a restrictive definition of program-length children's commercials that "would jeopardize highly acclaimed children's shows such as Sesame Street and Disney programs that have products associated with them," and "would limit revenues from merchandising which are an important source of production funding. . . ."⁵⁵

The same reasoning applies in the present context: links to mixed-use websites that sell products associated with the program in which the links appear should not be prohibited, but should be encouraged, provided that such sites offer *bona fide* program content that enhances the educational value of the program. We would agree, however, that characters from the related program should not be used in the site to sell products or services.

B. The FCC Should Not Include Promotions, Public Service Announcements, Or Sponsored Educational Spots Within The Definition Of Commercial Matter.

Sesame Workshop strongly disagrees with the Commission's suggestion that the definition of commercial matter, "air time sold for purposes of selling a product or service,"⁵⁶ should be altered to include promotions of upcoming programs, PSAs, and sponsored

⁵⁴ *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd at 2117 (1991).

⁵⁵ *Id.*

⁵⁶ 47 C.F.R. § 73.670 Note 1.

educational spots, in order to force program producers to expand the amount of time devoted to program material.⁵⁷

When it undertook to implement the CTA's commercial limits, the Commission stated that it believed the statute's intent was to define commercial matter "in terms of common parlance, i.e., as air time sold for purposes of selling a product. . . . essentially the definition contained in former FCC Form 303," which excluded program promotions and PSAs.⁵⁸

Equally important, even assuming the Commission has authority to involve itself in the creative process to the extent of manipulating the length of long-form television programming, the particular proposals at issue would, if enacted, hinder television's ability to educate children, and thus contravene the intent of the CTA and the objective of the instant *Notice to improve* educational programming.

For example, including program promotions in the commercial matter category would tend to discourage the broadcast of such materials, notwithstanding that elsewhere in the *Notice*⁵⁹ the Commission proposes to make additional promotions of core programs mandatory (an idea we applaud because it will make it easier for children and parents to learn what programming is available).

Similarly, including PSAs and sponsored educational programming within the definition of commercial matter will curtail both worthy public interest efforts such as anti-smoking and anti-drug campaigns, and such short-form educational programming as the

⁵⁷ *Notice* at 14.

⁵⁸ *Policies and Rules Concerning Children's Television Programming, Notice of Proposed Rule Making*, FCC 90-373 at 3 & n.10 (1990).

⁵⁹ *See Notice* at 16.

Workshop's new informational series *Tiny Planets*, rather than encourage these valuable interstitials as the current FCC rules do.

For these reasons, the definition of commercial matter should not be altered.

V. CONCLUSION

The Commission should adopt a "three-hour/three-percent" processing guideline requiring the carriage of (i) three hours of core programming on DTV licensees' primary digital program stream, and (ii) an additional amount of core programming (on that or any other program stream) during three percent of the licensee's additional 7 a.m. to 10 p.m. transmission hours. The Commission should neither require datacasting to "enhance" core programming, nor bar direct links to mixed-use Internet sites during children's programming. The Commission should recommend government subsidies to level the economic playing field so that small producers can afford to create high quality programming with solid content that will be broadcast. It should not alter its definition of commercial matter.

Respectfully submitted,

SESAME WORKSHOP

Of counsel:

Daniel J. Victor, Esq.
Executive Vice President and General Counsel
Sesame Workshop
1 Lincoln Plaza
New York, NY 10023
(212) 875-6361

December 18, 2000

By: Barbara K. Gardner
Barbara K. Gardner

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, NW
Suite 600
Washington, DC 20006
(202) 429-8970

Its Attorneys